NO. 43632-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARLENE MARIE GREEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00438-4

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	Lenell Rae Nussbaum Market Place One, Ste 330 Seattle, Wa 98121-2161 Email: lenell@nussbaumdefense.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 24, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence at trial was sufficient to establish the corpus delicti of the charged offense when, viewing the evidence in a light most favorable to the State, the independent evidence was sufficient to support the "logical and reasonable inference" that the victim's death was caused by a criminal act of the Defendant?

2. Whether the trial court abused its discretion in excluding testimony from the defense expert when: (1) the Defendant admitted that the defense expert's theory was "novel" yet provided the trial court with no evidence that the theory was generally accepted in the scientific community; and (2) with the limited evidence before it, the trial court had no choice but to find that the defense had failed to show that the proposed testimony would have been helpful to the jury or admissible under ER 702?

3. Whether the Defendant's claim that the trial court erred in excluding evidence that the victim had previously bitten the Defendant and that the victim suffered from dementia is without merit when: the trial court did not preclude all testimony regarding these issues but rather only precluded the Defendant from introducing these issues via the self-serving hearsay statements that the Defendant had made to various police officers?

4. Whether the trial court abused its discretion in refusing to give a jury instruction regarding the Defendant's summary of the case when: (1) the defendant's instruction was confusing; and (2) the trial court's instructions allowed the parties to argue their theories of the case and properly informed the jury of the applicable law?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Darlene Green was charged by amended information filed in Kitsap County Superior Court with one count of Murder in the Second Degree and one charge of Manslaughter in the First Degree. CP 6-9. A jury found the Defendant not guilty on the charge of Murder in the Second Degree but found her guilty of the crime of Manslaughter in the First Degree. CP 46. The trial court then imposed an exceptional sentence below the standard range. CP 47-48. This appeal followed.

B. FACTS

On June 18, 2004, Brad Green received a phone call from his mother, the Defendant. RP 255, 260-61. The Defendant told her son that his father was dead. RP 261. Brad Green responded, "What do you mean my dad is dead?" RP 261. The Defendant then said, "I shot him." RP 261. Brad Green explained that during this conversation the Defendant wasn't shaken or crying and didn't appear to be upset. RP 261-62.

Rather, Brad Green testified that "She was almost, I don't know, a sad way of putting it is, proud. I can't understand that but it was. No emotion." RP 261-62.

Brad Green immediately called 911 and reported what the Defendant had said. RP 262. Brad Green then got in his car, picked up his wife, and drove to the residence that the Defendant shared with her husband, William Green. RP 262-63.

A number of Kitsap County Sheriff's Deputies, including David Anderson and Lee Watson, responded to the Defendant's residence on Illahee Road. RP 273, 276, 291. The Defendant was standing on a deck by the front porch. RP 275-76, 294. Deputy Watson approached the Defendant and asked her to remove her hand from her pocket. RP 295. Once the Defendant had showed her hands, Deputy Watson came closer to her and could see that she was covered in blood. RP 276-77, 295-96, Exhibit 34-35. Deputy Watson then detained the Defendant in handcuffs. Deputy Watson testified that the Defendant was calm and did not appear distraught or upset throughout his contact with her. RP 298, 300.

The only question Deputy Watson asked the Defendant during this initial contact was whether she had any weapons on her. RP 298. The Defendant said she did not. RP 298. The Defendant went on to state that "he" had urged her to shoot him all day and that he had cocked the gun

and that she had then shot him. RP 298. These statements were not made in response to any questions, and Deputy Watson did not initially know who the Defendant was talking about when she used the word "he." RP 298.

While Deputy Watson was contacting the Defendant, several other deputies entered the residence to "clear" it and to check on the potential victim. RP 276-77, 308-09. The Deputies found the victim, William Green, on the floor with what appeared to be a bullet wound between his eyes. RP 276-77, 310, 323, Exhibits 14-19. A firearm was lying on the floor. RP 277, 310. A paramedic was called in and confirmed that the victim was dead. RP 315.

Deputy Watson then escorted the Defendant to a patrol car, and as they were walking to the car he began advising her of her Miranda warnings. RP 280-81, 299-300. The Defendant did not appear to have any difficulty in understanding her rights and did not appear confused. RP 300. While at the patrol car the Defendant stated that she had shot her husband and that, "I don't know what the big deal is. I just did what he told me to do." RP 281. This statement was not in response to a question, and the Defendant repeated her statement several times. RP 281. Deputy Anderson testified that the Defendant sounded "very calm." RP 281.[1]

[1] One of the victim's sons, Kirt Green, had also arrived at the scene and was very upset

The Defendant was transported to a sheriff's office precinct in Silverdale where she was interviewed by Detective Michael Rodrigue. RP 442.[2] Deputy Rodrigue testified that the Defendant was calm during the interview. RP 445. The Defendant explained that during the afternoon she was watching television in the living room with her husband. RP 448. Mr. Green got up and told the Defendant that he was going to the bedroom to get his gun. RP 448. Mr. Green further said that the Defendant could shoot him and that if she did so "she would know what would happen to her." RP 448. Detective Rodrigue asked the Defendant what she thought Mr. Green meant by this comment. RP 448. The Defendant responded that she knew she would end up going to jail. RP 448. The Defendant then told Detective Rodrigue that Mr. Green then retrieved a firearm from the bedroom and came back into the living room where he cocked the gun, held it up to his own head, leaned over the chair where the Defendant was sitting, and told her to go ahead and shoot him. RP 449-50. The Defendant said that she then reached up, took the gun and shot him. RP 449.

Detective Rodrigue asked the Defendant if something had been going on between her and Mr. Green that afternoon, and the Defendant

---

and was "clearly shaken up." RP 282, 294.

[2] Before the interview began, Detective Rodrigue again advised the Defendant of her rights. RP 444.

said that nothing had been going on and that they had been watching TV and that Mr. Green's retrieval of the gun was kind of out of the blue. RP 449.

The Defendant further said that she didn't know why this was such a big deal, since Mr. Green had told her to shoot him and she just did what he had asked her to do. RP 449-50.

An autopsy was later performed and confirmed that the victim had died of a gunshot wound to the head. RP 334. The bullet entered the defendant's head in the forehead, penetrated the skull, and caused damage to the brain including the brain stem and cerebellum. RP 337-39. These injuries would have caused immediate unconsciousness, loss of body function, and death. RP 340. The autopsy also showed that there was soot present in the wound which indicated that the firearm would have been either pressed against the head or close to it when the bullet was fired. RP 342-43.

Both of the victim's hands were covered in blood, and the palm of the victim's right hand had some discoloration, bruising, and gunpowder, which indicated that at the time of the shooting the victim's right hand was next to the "cylinder gap" of the firearm. RP 345-46. 395; Exhibits 41-43.

The victim's left hand was also covered in blood, although there was a "gap" or "void" on the "inside "pad of the left thumb that was not covered in blood. RP 358-59, Exhibit 47. While the defense argued that this void suggested that the Defendant had shot himself by pulling the trigger with his left thumb, a witness for the State (Detective Phil Doremus) specifically testified that the blood splattering on the victim's thumb was inconsistent with the victim's thumb being inside the trigger guard and thus the victim's thumb had not been on the trigger. RP 409, 411-12.

Detective Doremus has been with the Sheriff's office for 20 years and has been a detective for 14 years and been a crime scene investigator for 12 years. RP 369-70. He has been the crime scene investigator in more than a dozen homicides, and has been trained in blood stain pattern analysis. RP 370-71. Detective Doremus photographed and processed the scene at the Green residence. RP 371-72.[3]

Based on his analysis of the scene and the physical evidence, Detective Doremus reached several conclusions. First, Detective Doremus concluded that based on the distribution of blood that the victim was leaning over the recliner when he was shot. RP 391. In addition, Detective Doremus explained that the blood "void" on the inside of the victim's left

[3] Deputy Doremus seized the firearm. RP 378; Exhibit 1. He also found a paper towel

thumb was inconsistent with that thumb being on the trigger and inside the trigger guard. RP 398, 409. Specifically, Detective Doremus explained that,

> The void on the left thumb didn't go in a complete line all the way up. There was a horizontal portion of it. It had – in my opinion, had the thumb been inside the trigger guard, there would have been a complete void around the thumb itself.

RP 409. He also specifically testified that the blood splattering on the victim's thumb was inconsistent with the victim's thumb being inside the trigger guard, and that it was his opinion, based on his training and experience, that the victim's thumb had not been on the trigger. RP 411-12.

At trial the Defendant did not raise a claim of self defense. Rather, the Defendant's claim was that the victim killed himself. In addition, the defense indicated that it intended to call Dr. Maiuro as a defense expert and that Dr. Maiuro would testify that the Defendant suffered from Battered Woman's Syndrome. CP TBD (State's Supplemental Designation of Clerk's Papers – "Defendant's Response to State's Motion on Expert Testimony" at page 1). In a written report Dr. Maiuro concluded that the Defendant's initial reports to her family that she had shot her husband were not correct and the her later assertion that she did

---

coated with blood in the kitchen trash can. RP 387; Exhibits 26 and 28.

not shoot her husband was credible. Specifically, Dr. Maiuro has stated that "The fact that she said, or may have initially thought, she was responsible for the shooting, does not necessarily man that her current, more considered, assertion that she did not is not credible." CP 84. Dr. Maiuro also states that the Defendant explained to him that that at the time she thought she did, or might have shot her husband, but that now she is sure she did not shoot her husband. CP 81.

The State argued that Dr. Maiuro's testimony was inadmissible. The State acknowledged that Battered Spouse Syndrome evidence may be admissible in self-defense cases to explain the subjective understanding of a spouse who uses lethal force to respond to an imminent threat of serious physical harm. CP 68, 359. Thus, the syndrome can be relevant to assisting the jury in understanding how a victim of spousal abuse might reasonably perceive otherwise minor acts of aggression or hostility as a precursor to a very real life threatening situation, making the self defense actions of the victim reasonable since "Once the jury has placed itself in the defendant's position, it can then properly assess the reasonableness of the defendant's perceptions of imminence and danger." CP 68 (quoting *State v. Janes*, 121 Wn.2d 220, 239, 850 P.2d 495 (1993

The State further argued that it was unaware of any authority for a claim that Battered Spouse Syndrome can cause a person to inaccurately

perceive an event or, because of some delusion, fabricate a threat or event that did not occur. CP 68. The State also argued that the issue of a witness's credibility is uniquely within the purview of the jury and that it would be improper for Dr. Maiuro to offer an opinion on the Defendant's credibility. CP 69-70.

At the January 30, 2012 hearing on the issue, the trial court started the discussion with the following exchange with defense counsel:

> The Court: It's clear from both sets of briefs that nobody contemplates a Frye hearing; is that on purpose or otherwise? I see nothing from any cases that I and my clerk have researched that addresses the proposed context of your expert's opinion. Is there something we've missed?
>
> [Defense Counsel]: No your honor.

RP (1/30/2012) 13.

Dr. Maiuro did not testify at the hearing, but Defense counsel did specifically state that the witness would testify at trial that he had diagnosed the Defendant as being a battered woman, and that this may explain why she had said she had shot her husband. RP (1/30/2012) 14. The trial court explained that,

> That the next leap that I'm having trouble with. I haven't seen that anywhere, except with regard to your expert.
>
> I mean, the concept of disassociation, the concept of altered perception, those are not listed as symptoms of

PTSD in the DSM-IV.

So I guess I'm having – is this new? Is it novel? Is it accepted? Is this a *Frye* issue?

RP (1/30/2012) 14. The trial court later raised this same point and asked, "But is there anywhere in the literature that indicates that they take on responsibility for something they've not done? I've not seen that." RP (1/30/2012) 22. Defense counsel then responded,

> Off the top of my head, I can't say that there is at this point in time. It is novel, Your Honor. If the court wants to have a *Frye* hearing on it, I'm sure that can be arranged. I will check further with my doctor to see if he's got any more literature on it.

RP (1/30/2012) 22-23. Defense counsel, however, never provided any additional information or literature to the court, and defense counsel never made a specific request for a *Frye* hearing.

The State also argued that Dr. Maiuro's proposed testimony was directed at the credibility of the victim, which was solely within the purview of the jury. CP 69. Although Dr. Maiuro's report repeatedly mentions his opinions regarding the Defendant's credibility,[4] defense counsel claimed that Dr. Maiuro would not be called to testify on the Defendant's credibility. RP (1/30/2012) 13, 22-23. The trial court questioned defense counsel's claim, however, in the following exchange:

> The Court: I understand that you're not going to be calling your expert to testify as to credibility. But the testimony clearly raises the inference bearing on credibility as it seeks to explain why she would offer two different statements regarding her culpability at different times. So how could that not go to credibility and saying, given this condition, her later statements are more probative and more accurate than the former?
>
> Defense Counsel: But that is not the intention, Your Honor. The intention is to explain –
>
> The Court: That's where you hope to go. Let's be honest.

RP (1/30/2012) 24.

The trial court later issued a written memorandum opinion on the issue. CP 99. The trial first cited ER 702 and the rules regarding its application and further noted that the issue of admissibility required the court to examine whether the expert's opinion was "based upon an explanatory theory generally accepted in the scientific community" and whether the expert's testimony "would be helpful to the trier of fact." CP 100.[5] The trial explained that it was aware of no appellate cases applying the theory proposed by Dr. Maiuro and that "altered perception of the traumatic event during or immediately after the event" was not a listed symptom of PTSD. CP 101 (citing the DSM IV at 463-68). The court thus found (consistent with the Defendant's own concession) that the defense expert's theory was "novel." CP 101.

---

[4] See CP 81, 83-85.

The court further noted that "neither party has requested a *Frye* hearing, and that the "Defendant has not offered or referenced any authority or other evidence that Dr. Maiuro's theory is generally accepted in the scientific community." CP 101. Furthermore, the trial court noted that expert testimony is often disallowed when a matter is within the common understanding of a juror, and that particular scrutiny is given to expert testimony bearing on another witness's credibility. CP 102 (*citing State v. King*, 131 Wn.App. 789, 797, 130 P.3d 376 (2006)). The trial court then concluded that Dr. Maiuro's testimony was unlikely to be helpful to the trier of fact and would invade the jury's duty to determine witness credibility. CP 102-03. The trial court thus ruled that "Dr. Maiuro is not permitted to testify regarding Defendant's Battered Spouse Syndrome and PTSD insofar as it attempts to explain her inconsistent statement about the shooting." CP 103.

[5] The trial cited *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004).

III. ARGUMENT

A. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO ESTABLISH THE CORPUS DELICITI OF THE CHARGED OFFENSE BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE INDEPENDENT EVIDENCE WAS SUFFICIENT TO SUPPORT THE "LOGICAL AND REASONABLE INFERENCE" THAT THE VICTIM'S DEATH WAS CAUSED BY A CRIMINAL ACT OF THE DEFENDANT.

The Defendant first argues that there was insufficient evidence of the corpus delicti of the charged offense. App.'s Br. at 21. This claim is without merit because, assuming the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State, the independent evidence was sufficient as it support a "logical and reasonable inference" that the victim's death was caused by a criminal act of the Defendant. The evidence thus established a prima facie case of guilt. Nothing more is required.

It is also well settled that only two elements are necessary to establish the corpus delicti in a homicide case: the fact of death and a causal connection between the death and a criminal act. *State v. Hummel*, 165 Wn.App. 749, 758, 266 P.3d 269 (2012), *citing State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996); *State v. Lung*, 70 Wash.2d 365, 371, 423 P.2d 72 (1967); *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120 (1961);

State v. Richardson, 197 Wash. 157, 163, 84 P.2d 699 (1938); *State v. Gates*, 28 Wash. 689, 69 P. 385 (1902); *State v. Rooks*, 130 Wn.App. 787, 125 P.3d 192 (2005); *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985). The independent evidence may be either direct or circumstantial and need not be of such character as would establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. *Aten*, 130 Wn.2d at 656; *Hummel*, 165 Wn.App. at 759; *Rooks*, 130 Wn.App. at 802. It is sufficient if it prima facie establishes the corpus delicti. *Aten*, 130 Wn.2d at 656; *Rooks*, 130 Wn.App. at 802. "Prima facie" in the context of the corpus delicti rule means "'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved." *Aten*, 130 Wn.2d at 656 (quoting *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)); *Rooks*, 130 Wn.App. at 802. In analyzing whether there is sufficient evidence to support the corpus delicti of the crime, this court "assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State." *Aten*, 130 Wn.2d at 658; *Hummel*, 165 Wn.App. at 759; *Rooks*, 130 Wn.App. at 802-03.

Relying on *Aten*, the Defendant in the present case argues that because the evidence supports reasonable and logical inferences of both criminal and non-criminal causes of the victim's death, the corpus delicti

was not established. App.'s Br. At 23-25. The Court of Appeals, however, has explained that *Aten* does not stand for the proposition that the corpus delicti is not established when there is more than one logical and reasonable explanation for the death. *See*, *Rooks*, 130 Wn.App. at 803-04.

For instance, in *Rooks* the Defendant had confessed to strangling the victim and the victim's body was recovered from a drainage ditch in a remote area. *Rooks*, 130 Wn.App. at 793-94. Due to the advanced state of decomposition, the medical examiner testified he was unable to determine the cause of the victim's death. *Id* at 794. The examiner found evidence that the victim had ingested cocaine within a few days of her death, and was unable to exclude either strangulation or cocaine overdose as the cause of death. *Id.* Relying on *Aten*, the defendant argued on appeal that because the evidence supported reasonable and logical inferences of both criminal and non-criminal causes of the victim's death, the corpus delicti was not established. *Id* at 803. The Court of Appeals discussed *Aten*, but ultimately disagreed with the defendant's analysis of that case and stated,

> In *Aten*, the defendant confessed to killing an infant by manually suffocating the baby. The independent evidence established the infant died of acute respiratory failure, but the medical examiner testified he could not determine whether the respiratory failure was caused by Sudden Infant Death Syndrome (SIDS) or suffocation. At trial, the medical examiner testified that he concluded the infant died

> from SIDS and described the similarity in the infant's death to a typical SIDS case. The Court held that the corpus delicti is not established where the independent evidence supports reasonable and logical inference of both criminal agency and non-criminal cause and under the facts presented in that case there was insufficient evidence to establish the corpus delicti. *Aten*, 130 Wash.2d at 660, 927 P.2d 210. "The totality of independent evidence in this case does not lead to the conclusion there is a 'reasonable and logical' inference that the infant ... died as a result of criminal negligence and that that inference is not the result of 'mere conjecture and speculation.' " *Aten*, 130 Wash.2d at 661, 927 P.2d 210.
>
> Rooks assumes the Court in *Aten* concluded the corpus delicti was not established because there was more than one logical and reasonable explanation for the death. But *Aten* clearly states there was no reasonable inference of criminal conduct in that case. *Aten*, 130 Wash.2d at 661, 927 P.2d 210. Because the Court concluded there was no reasonable and logical inference that the infant died as a result of criminal negligence, *Aten* does not hold that the corpus delicti cannot be established where there are reasonable and logical inferences of both criminal and non-criminal causes of death.

Rooks, 130 Wn.App. at 803-04. The Court of Appeals then concluded that (unlike in *Aten*) "the totality of the independent corroborating evidence leads to the conclusion that there is a causal connection between [the victim's] death and a criminal act." *Rooks*, 130 Wn.App. at 804, 806.

Similarly, in *State v. Hummel*, 165 Wn.App. 749, 266 P.3d 269 (2012), the defendant's wife had disappeared. Although the victim's body was never recovered, the defendant later admitted that the victim had died but claimed that she had committed suicide. *Id* at 757. Specifically, the

defendant claimed that his wife had slit her wrists and left a note instructing him to not "let the kids know." *Id.* The defendant also claimed that he panicked and had dumped his wife's body in Bellingham Bay. *Id.* The Defendant was eventually arrested, and while he was in jail he told a fellow inmate that he helped his wife go to a "better place" by mixing ground up pills into apple cider and giving it to his wife to drink. *Id.*

The defendant argued in the trial court and on appeal that there was insufficient evidence of the corpus delicti of the crime of murder. *Hummel*, 165 Wn.App. at 757-58. The defendant specifically cited *Aten* and *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006), and argued that that the independent evidence is insufficient to establish the corpus delicti unless it also "prove [s] the nonexistence of any reasonable hypothesis of innocence." *Hummel*, 165 Wn.App. at 766. The defendant then claimed that since his wife's body was never found, the independent evidence did not eliminate the possibility that she had simply left or died of natural causes. *Id* at 761.

The Court of Appeals addressed *Aten* and explained that the *Aten* Court had cited *State v. Lung*, 70 Wn.2d at 371, for its language about proving the "nonexistence of any reasonable hypothesis of innocence." *Hummel*, 165 Wn.App. at 766, *citing Aten*, 130 Wn.2d at 660 (*quoting Lung*, 70 Wash.2d at 371). The Court then explained that a review of

Lung was instructive. In *Lung*, the defendant's estranged wife had disappeared and her body was never recovered. *Hummel*, 165 Wn.App. at 766-67. When questioned by the police, the defendant had claimed that a loaded rifle in a closet had accidentally discharged, killing the victim, and that he had panicked and disposed of the victim's body in a river. *Id.* The *Lung* Court ultimately rejected the defendant's corpus delicti argument, and held,

> The difficulty in the case at bar is the fact that the body of the victim was never found. Is the body or some part thereof required to establish the 'fact of death' element in the corpus delicti? We think not. To require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable and would lead to absurdity and injustice.
>
> The final test is whether the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence. All that is required to prove death is circumstantial evidence sufficient to convince the minds of reasonable men of the existence of that fact. The law employs the judgment of reasonable minds as the only means of arriving at the truth by inference from the facts and circumstances in evidence. If this were not true, an infinite number of crimes involving the elements of a specific intent would go unpunished.

Lung, 70 Wn.2d at 371, *cited by Hummel*, 165 Wn.App. at 767-68. The *Hummel* court then explained that when the above passage is viewed in context, it clearly holds that, "even without the body, where the independent circumstantial evidence is sufficient to convince reasonable

minds of the fact of death and of the causal connection between the death and a criminal act, the corpus delicti is satisfied and the accused's statements are admissible." *Hummel*, 165 Wn.App. at 768.[6]

The Hummel Court then further explained that the defendant's arguments in *Hummel* mirrored the arguments made by the defendant in *Rooks*, and that the court had previously rejected that argument as it was a misreading of *Aten*. *Hummel*, 165 Wn.App. at 768-69. Specifically, the court noted that in *Rooks* it had explained that the *Aten* court's holding was based on the fact that in *Aten* there was "no reasonable inference of criminal conduct," and that the *Aten* decision "does not hold that the

---

[6] Furthermore, the *Hummel* court also explained that the relevant language from *Lung* was both dictum and a misreading of a long-abandoned evidentiary and jury instruction standard that was unrelated to the corpus delicti rule. *Hummel*, 165 Wn.App. at 768n.6. Specifically, the *Hummel* Court explained that,

> "The statement in *Lung*, later cited by the *Aten* court, that "the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence." *Lung*, 70 Wash.2d at 371, 423 P.2d 72, was unrelated to the application of the corpus delicti rule, but instead was related how circumstantial evidence was weighed in 1967 when *Lung* was decided. That rule that was abrogated by our Supreme Court in 1975, as courts around the country came to realize that some circumstantial evidence was not necessarily less reliable than some "direct" evidence, e.g., eyewitness identification. *State v. Gosby*, 85 Wash.2d 758, 762–66, 539 P.2d 680 (1975) (abrogating rule requiring the jury to be instructed that "to sustain a conviction on circumstantial evidence alone, the circumstances proved by the State must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any reasonable hypothesis or theory which would establish, or tend to establish, his innocence"). It would be anomalous that this rule would be abandoned when considering whether the reasonable doubt standard has been met, but adhered to in determining whether prima facie the corpus delicti has been established. The statement in *Aten* that proof of the corpus delicti must be inconsistent with innocence was both dictum and a misreading of a long-abandoned evidentiary and jury instruction standard that was unrelated to the corpus delicti rule."

Hummel, 165 Wn.App. at 768 n.6.

corpus delicti cannot be established where there are reasonable and logical inferences of both criminal and non-criminal causes of death." *Id* at 769, *quoting Rooks*, 130 Wn.App. at 803-04. Rather, under Washington law the corpus delicti is satisfied where the totality of the independent evidence supports a reasonable and logical inference that there was a death and a causal connection between the death and a criminal act. *Hummel*, 165 Wn.App. at 769-70.

The *Hummel* court thus ultimately concluded, just as it had previously done in *Rooks*, that when the evidence was viewed in a light most favorable to the State (and all reasonable inferences are construed in favor of the State), the evidence led to a reasonable and logical conclusion that Hummel's wife was in fact deceased and that her death was a result of a criminal agency. *Id* at 770. The *Hummel* court thus clearly rejected the defendant's claim that the independent evidence did not eliminate the possibility that the victim had simply left or died of natural causes and thus did not prove the nonexistence of any reasonable hypothesis of innocence.[7]

Furthermore, it is critical to note that the Washington Supreme Court has repeatedly stated (even in the *Aten* opinion itself) that the

---

[7] The Washington Supreme Court denied review in both *Rooks* and *Hummel*. *State v. Rooks*, 158 Wn.2d 1007, 143 P.3d 830 (2006); *State v. Hummel*, 176 Wn.2d 1023, 297

independent evidence may be either direct or circumstantial and need not be of such character as would establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. *Aten*, 130 Wash.2d at 656; *Bremerton v. Corbett*, 106 Wn.2d 569, 574–75, 723 P.2d 1135 (1986); *Hummel*, 165 Wn.App. at 758-59. It is sufficient if it prima facie establishes the corpus delicti. *Aten*, 130 Wn.2d at 656, *Hummel*, 165 Wn.App. at 759. Finally, the Supreme Court has specifically stated that "The independent evidence need not [have been] sufficient to support a conviction or even to send the case to the jury." *Corbett*, 106 Wn.2d at 578.

Furthermore, the Supreme Court has not waivered from its holding that, an appellate court is to assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *Aten*, 130 Wn.2d at 658; *Hummel*, 165 Wn.App. at 759. Finally, although the corpus delicti is not established when there are no reasonable and logical inferences of a crime, Washington law does not hold that the corpus delicti cannot be established where there are reasonable and logical inferences of both criminal and non-criminal causes of death.[8] *Rooks*, 130 Wn.App. at 803-04; *Hummel*, 165 Wn.App. at 768-69. Such a rule would be akin to a requirement that the independent evidence establish the crime *beyond a*

P.3d 708 (2013).

reasonable doubt (or even beyond all doubt). That, of course, would be inconsistent with decades of Washington law that has held that the State need not establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence, rather it is sufficient if the evidence *prima facie* establishes the corpus delicti.

In the present case, assuming the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State, the independent evidence was sufficient as it support a "logical and reasonable inference" that the victim's death was caused by a criminal act of the Defendant. The evidence thus established a prima facie case of guilt. Nothing more is required.

Specifically, the independent evidence established that the victim died of a gunshot would to the front of his head that occurred when he was leaning over a chair in his home. RP 334, 391. Testimony also established that the victim's right hand was wrapped around the cylinder gap of the firearm. RP 345-46, 395. Further, Detective Doremus specifically testified that the blood splatter on the victim's left had was inconsistent with his having his left thumb on the trigger of the weapon. RP 409, 411-12. The Splatter evidence was consistent with someone else pulling the

[8] *See, e.g., Aten*, 130 Wm.2d at 656, *Hummel*, 165 Wn.App. at 758-59.

trigger.[9] RP 362, 364. The Defendant, the only other person found at the home, was found covered in blood. RP 276-77, 295-96, 721; Exhibits 34-35. The Defendant did not appear upset or overly emotional about her husband's death. Rather, numerous witnesses described that she did not appear distraught, upset or shaken, but rather appeared "calm," and as her son described, "almost . . . proud."[10] RP 261-62, 281, 298, 300, 445.

Viewing this evidence in a light most favorable to the State and drawing all reasonable inferences from it in a light most favorable to the State, the independent evidence was sufficient to support the "logical and

---

[9] Furthermore, a juror could also reach the logical and reasonable inference that the manner in which the victim held the gun was inconsistent with a suicide. Obviously a person intent on shooting themselves has a number of options in terms of placement of the weapon. The person could, of course, hold the gun normally and shoot themselves in the side of the head, under the chin, or even in the center of the forehead. See RP 605-07. None of these options would require the odd handling of the firearm that clearly occurred in the present case. Id. In short, a juror could have logically and reasonably inferred that the manner in which the victim held the gun was inconsistent with a suicide.

[10] The Defendant's testimony also established certain facts which can go to support the corpus delicti, because the rule only applies to extrajudicial statements. *See, e.g*, *Hummel*, 165 Wn.App. at 758 n.1 ("[W]e note we note that there is abundant authority that the corpus delicti rule does not apply to statements made in open court."), citing *Bremerton v. Corbett*, 106 Wn.2d 569, 575–76, 723 P.2d 1135 (1986) ("The rule requiring independent corroboration of *extrajudicial* confessions and admissions is one of the oldest confession doctrines."); *State v. Bestolas*, 155 Wash. 212, 215, 283 P. 687 (1930) ("[I]t is the better rule that *extrajudicial* confessions or admissions ... are, in the absence of corroborating testimony ... insufficient to prove the corpus delicti."); *State v. Neslund*, 50 Wn.App. 531, 542, 749 P.2d 725 (1988) ("Under the corpus delicti rule, an *extrajudicial* confession or admission may not be considered by the trier of fact unless independent proof prima facie establishes the corpus delicti of the crime.");(Emphasis added by *Hummel* Court). Thus Washington law clearly holds that a defendant's statements in court can be used to establish the sufficiency of the evidence in terms of the corpus delicti of the crime. In the present case, for instance, the Defendant testified that she and the victim were alone in the house and that the victim went and got the firearm and asked the Defendant to shoot him. RP 704, 719, 721. These in court statements can be used to establish the sufficiency of the evidence and provide further support for the logical and rational inference that the Defendant shot the victim.

reasonable inference" that the victim's death was caused by a criminal act of the Defendant. The Defendant's corpus delicti argument, therefore, is without merit.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONY FROM THE DEFENSE EXPERT BECAUSE: (1) THE DEFENDANT ADMITTED THAT THE DEFENSE EXPERT'S THEORY WAS "NOVEL" YET PROVIDED THE TRIAL COURT WITH NO EVIDENCE THAT THE THEORY WAS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY; AND (2) WITH THE LIMITED EVIDENCE BEFORE IT, THE TRIAL COURT HAD NO CHOICE BUT TO FIND THAT THE DEFENSE HAD FAILED TO SHOW THAT THE PROPOSED TESTIMONY WOULD HAVE BEEN HELPFUL TO THE JURY OR ADMISSIBLE UNDER ER 702.

The Defendant next claims that the trial court erred in excluding testimony from the Defendant's expert witness on Battered Woman's Syndrome. App.'s Br. at 28. This claim is without merit because, given the limited record before it, the trial court did not abuse its discretion in excluding the defense expert.

As a preliminary matter, it is important to clarify exactly what issues were before the trial court with respect to the defense expert. First, the Defendant did not raise a claim of self defense. Rather, the Defendant's claim was that the victim killed himself.

Furthermore, the defense indicated that it intended to call Dr. Maiuro as a defense expert regarding "Battered Woman's Syndrome." CP TBD (State's Supplemental Designation of Clerk's Papers: 11/01/2011 "Defendant's Response to State's Motion on Expert Testimony"). The Defense, however, never provided any live testimony from Dr. Maiuro, nor did the defense ever provide a formal offer of proof. Rather, the only information regarding the proposed testimony came in the Defendant's brief response to the State's motion and in an 8 page written report that Dr. Maiuro had prepared. Although the Defendant's response claimed that Dr. Maiuro would testify regarding "battered woman's syndrome, those words do not appear in the Dr. Maiuro's written report. The trial court and the State, however, took defense counsel at his word and operated under the assumption that the expert would testify about the syndrome.

Dr. Maiuro's report states that it was prepared in order to address three questions:

1. What is Darlene Green's psychological and behavioral emotional profile in reference to the present allegations of having shot her husband?
2. Does Darlene Green's prior history of arrest for domestic violence and associated alcohol abuse suggest that she was a domestic violence perpetrator and had elevated risk to commit the present act of violence against her husband? And,
3. Given her prior alleged comments that she shot or may have shot her husband, is Darlene's present claim that she did not shoot her husband still credible?

CP 78. Dr. Maiuro then explains that he found evidence of post-traumatic stress symptoms. CP 79. With respect to the first question, Dr. Maiuro opined that,

> Although there is a reported and/or documented history of abuse between the parties in which Darlene was identified as "the perpetrator" and amore extended history of reciprocal abuse, it is my opinion that Darlene was a victim of domestic violence during the episode in question and her husband, William the perpetrator.
>
> . . .
>
> Darlene Green's current rendition of events and claim that she did not shoot her husband, and that he must have died by his own hand, appears to be credible.

CP 83. With respect to the second question he opined that Mr. Green was primary aggressor and the Defendant was actually the victim. CP 84. With respect to the third questions, Dr. Maiuro opined that the fact that the Defendant said or thought she was responsible for the shooting "does not necessarily mean that her current, more considered, assertion that she did not is credible." CP 84.

Prior to trial the State filed a motion to exclude Dr. Maiuro's testimony. CP 66. The State argued that it would be improper for Dr. Maiuro to offer his opinion of the Defendant's credibility CP 69-70. The Defendant did not contest this point, and agreed that expert would not testify about his opinion on which of the Defendant's version of events

was truthful. RP (1/30/2012) 13, 22-23.

The State also argued that although Battered Woman's Syndrome may be admissible in self-defense cases to explain the subjective understanding of a spouse who uses lethal force to respond to an imminent threat of serious physical harm, the Syndrome is not a defense in and of itself. CP 68, 359. The State further argued that it was unaware of any authority for a claim that Battered Spouse Syndrome can cause a person to inaccurately perceive an event or, because of some delusion, fabricate a threat or event that did not occur. CP 68.

At the hearing on the issue, the trial court was clearly troubled by the limited information provided by the defense. The court, for instance, noted that it had been unable to find any cases that addressed the proposed context of the defense expert's opinion, and the court expressed apparent dismay that the defense was not seeking a *Frye* hearing. RP (1/30/2012) 13. The court further explained that defense expert's opinion seemed to be unsupported by any authority and the court specifically explained to defense counsel that,

> I mean, the concept of disassociation, the concept of altered perception, those are not listed as symptoms of PTSD in the DSM-IV.
>
> So I guess I'm having – is this new? Is it novel? Is it accepted? Is this a *Frye* issue?

RP (1/30/2012) 14. The trial court later raised this same point and asked, "But is there anywhere in the literature that indicates that they take on responsibility for something they've not done? I've not seen that." RP (1/30/2012) 22. Defense counsel then responded,

> Off the top of my head, I can't say that there is at this point in time. It is novel, Your Honor. If the court wants to have a *Frye* hearing on it, I'm sure that can be arranged. I will check further with my doctor to see if he's got any more literature on it.

RP (1/30/2012) 22-23. Despite the fact that the trial court clearly explained the difficulties posed by the limited information provided by the defense, the Defendant never provided any additional information or literature to the court, and defense counsel never called Dr. Maiuro to the stand to provide an offer of proof nor did defense counsel ever make a specific request for a *Frye* hearing.

In sum, defense counsel acknowledged that the defense theory was "novel" and admitted that he was unaware of any caselaw or literature that would support the defense theory. Under Washington law the issue of "Whether a scientific method or technique is generally accepted requires more than the bare assertion by one expert witness that the technique is reliable." *State v. Ahlfinger*, 50 Wn.App. 466, 469, 749 P.2d 190, review denied, 110 Wn.2d 1035 (1988). The trial court's apparent frustrations,

therefore, were clearly justified.

Turning then to the trial court's ultimate ruling, the record below clearly demonstrates that the trial court did not abuse its discretion in excluding testimony from the Defendant's proposed expert witness. To the contrary, given the limited information provided below, the Defendant clearly failed to show that the defense theory was generally accepted in the scientific community and thus failed to show that the expert testimony was admissible under ER 702.

The admissibility of expert testimony is within the trial court's discretion. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Expert psychological testimony may be admitted to assist juries in understanding phenomena that are not within the competence of the ordinary lay juror. *Cheatam*, 150 Wn.2d at 646.

Washington courts have previously addressed "battered woman's syndrome" and explained that the syndrome is a collection of behavioral and psychological characteristics exhibited by victims of prolonged abuse inflicted by their partners. *See, e.g., State v. Riker*, 123 Wn.2d 351, 358, 869 P.2d 43 (1994). Washington courts have admitted expert testimony on the battered person syndrome to explain a defendant's perception of threat and the reasonableness of the force employed in self-defense against that threat, and also to explain a delay in reporting abuse and a failure to leave

the abusive environment. *State v. Hanson*, 58 Wn.App. 504, 508 n. 4, 793 P.2d 1001, *review denied*, 115 Wn.2d 1033 (1990); *see also State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) (expert testimony that defendant was battered was admissible to explain that defendant was "hypervigilant" and can aid the jury in evaluating the manner in which the defendant perceives the imminence of danger, and thus can assist the jury in determining whether the defendant's belief that he was in imminent danger of serious bodily harm was reasonable under the circumstances); *State v. Allery*, 101 Wn.2d 591, 597, 682 P.2d 312 (1984) (testimony concerning battered woman syndrome admissible to explain defendant's perception of the threat and the reasonableness of the force employed in self-defense against the threat).; *State v. Ciskie*, 110 Wn.2d 263, 278–79, 751 P.2d 1165 (1988).

Nevertheless, the syndrome is not an open-ended excuse for the allegedly battered spouse to use deadly force at time of convenience, nor is the syndrome a "defense in and of itself." *State v. Walker*, 40 Wn.App. 658, 664-665, 700 P.2d 1168 (1985). Rather,

> The function of evidence of the battered syndrome, offered through expert testimony, is merely to assist the trier of fact in evaluating the reasonableness of both the use of force and the degree of force used in a case involving the recognized circumstances of self-defense.

Walker, 40 Wn.App. at 664-665.

Furthermore, the Court of Appeals has held that evidence of battered woman's syndrome was not admissible in a case where the Defendant claimed that the gun had fired accidentally. *State v. Hanson*, 58 Wn.App. 504, 793 P.2d 1001 (1990). In *Hanson*, the Defendant claimed that she had quarreled with her boyfriend and that she had obtained a handgun from a bedroom during the argument. *Id* at 505. The Defendant stated that the victim started laughing when he saw the gun and then grabbed her arms and began shaking her, and that during this shaking the handgun discharged accidentally, hitting the victim. *Id* at 505-06. At trial, the Defendant sought to introduce testimony from an expert on Battered Woman's Syndrome. *Id* at 507. The trial court excluded the testimony, ruling that battered woman syndrome testimony would only be relevant to a claim of self-defense. *Id.* The Court of Appeals agreed that the proposed testimony was not relevant:

> The scientific basis and relevancy of such testimony in proper cases is now well established. On the facts before us, if Hanson had claimed self-defense, the testimony would have been appropriate and admissible as supportive of her apprehensions and mental state in firing the gun. However, such testimony is not supportive of the claim of accident presented here.

Hanson, 58 Wn.App. at 508.

The State acknowledges, however, that expert testimony regarding the fact that a person has been battered has previously been admitted to explain the seemingly inconsistent behavior of the victim. *See, Ciskie*, 110 Wn.2d at 280 (admitting expert testimony as to battered women syndrome to help the jury understand why the victim failed to leave the relationship or report the acts of violence).

The State is aware of no case, however, where expert testimony has been admitted to show that a battered victim or defendant would suffer from false perceptions that would explain why they had falsely admitted to killing their abuser. In addition, the trial court specifically pointed out that "altered perceptions" were not listed as symptoms of PTSD in the DSM-IV and asked defense counsel if there was any literature that supported a claim that Battered Woman's Syndrome had been found to cause a person to falsely take on responsibility for something that they have not done. Defense counsel's response was simply,

> Off the top of my head, I can't say that there is at this point in time. It is novel, Your Honor. If the court wants to have a *Frye* hearing on it, I'm sure that can be arranged. I will check further with my doctor to see if he's got any more literature on it.

RP (1/30/2012) 22-23. In addition, although there may be instances where expert testimony is admissible regarding false confessions, the Defendant

has cited no authority (either in the trial court or on appeal) that has held that expert testimony regarding Battered Woman's Syndrome is somehow admissible to explain an allegedly false confession.[11]

Furthermore, in addition to failing to show that the proposed expert testimony was consistent with what was generally accepted in the scientific community, the Defendant's proposed testimony and theory actually directly contradicts the rationale behind the admission of Battered Woman's Syndrome evidence. For instance, it is well understood that main point of Battered Woman's Syndrome evidence is to explain why a battered victim might reasonably perceive a legitimate threat to his or her safety in a situation where a normal person might not perceive such a threat. Thus, the evidence is admissible to show why the victim's perceptions were in fact *reasonable*.

The Defendant's argument in the present case, however, would turn this logic on its head. Specifically, the Defendant's theory was that

---

[11] The Defendant cites a number of out of state cases where court's have found that expert testimony was admissible to support a claim of a false confession. *See* App.'s Br. at 34-42, *citing State v. Beagel*, 813 P.2d 699 (Alaska 1991); *State v. King*, 904 A.2d 808 (N.J. 2006); *United States v. Shay*, 57 F.3d 126 (1st Cir 1995). None of those cases, however, involve expert testimony regarding Battered Spouse Syndrome. Rather, they involve expert testimony regarding various other mental disorders ("confabulation," "fugue state," "various personality disorders," and "pseudologia fantastica") that the experts were able to tie to the claim of a false confession. The State acknowledges that there may be instances where expert testimony is admissible to explain a false confession. In the present case, however, the Defendant failed to show how the claim of Battered Woman's Syndrome would explain a false confession or be helpful to the jury. The Defendant's citations, therefore, are simply irrelevant.

although the Defendant may have initially thought that she had shot the victim, this understanding was not credible. Rather, the Defendant's perceptions were inherently *unreasonable* and *untrustworthy* due her Battered Woman's Syndrome. This claim clearly runs contrary to the accepted understanding of the role of Battered Woman's Syndrome and, if accepted, would bring into doubt every case that has admitted evidence of the syndrome to explain why a victim's perceptions of an imminent threat were, in fact, reasonable.

In short, the Defendant in the present case acknowledged that the defense expert's theory was "novel" and that the Defendant was unaware of any authority or literature that would support a finding that the defense theory was generally recognized and accepted in the scientific community. Despite the fact that the trial court specifically pointed out that "altered perceptions" were not listed as symptoms of PTSD in the DSM-IV and asked defense counsel if there was any literature that supported a claim that Battered Woman's Syndrome had been found to cause a person to falsely take on responsibility for something that they have not done, Defense counsel never provided any authority to support the defense theory nor did he ever call the defense expert to the stand to provide any additional information. Rather defense counsel merely stated, "I will check further with my doctor to see if he's got any more literature on it."

RP (1/30/2012) 22-23. Defense counsel, however, never provided any additional information.

Given all of these facts, the Defendant has fallen far short of showing an abuse of discretion. The Defendant's claim, therefore, must be rejected.

C. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT THE VICTIM HAD PREVIOUSLY BITTEN THE DEFENDANT AND THAT THE VICTIM SUFFERRED FROM DEMENTIA IS WITHOUT MERIT BECAUSE: THE TRIAL COURT DID NOT PRECLUDE ALL TESTIMONY REGARDING THESE ISSUES; RATHER, THE TRIAL COURT ONLY PRECLUDED THE DEFENDANT FROM INTRODUCING THESE ISSUES VIA THE SELF-SERVING HEARSAY STATEMENTS THAT THE DEFENDANT HAD MADE TO VARIOUS POLICE OFFICERS.

The Defendant next argues that the trial court erred by prohibiting the Defendant from testifying about prior instances of domestic violence; specifically, that victim had bit the Defendant the night before the shooting. App.'s Br. at 18-19. This argument is without merit, because the trial Court never ruled that *the Defendant* could not testify about the alleged domestic violence. Rather, the trial court merely prohibited the defense from introducing hearsay evidence regarding out of court statements made by the Defendant regarding those allegations. CP 103-

04.

Prior to trial the State filed a "Memorandum on ER 106" seeking to preclude the defense from introducing self serving or exculpatory hearsay statements that the Defendant made to several law enforcement officers. CP TBD (See, Sept 9, 2011 "Memorandum on ER 106", included in the State's Supplemental Designation of Clerk's Papers). A hearing on this motion was held on January 30, 2012. At the hearing, the State explained that the State's motion was not aimed at the Defendant's own testimony (which obviously would not be hearsay if she actually took the stand), but rather was addressing whether the defense could attempt to introduce the Defendant's self serving hearsay statements through questioning of the law enforcement officers who took statements from the Defendant. RP (1/30/2012) 9-10.

The trial court ultimately issued a written memorandum opinion in which the court held that the defendant could not attempt to introduce the Defendant's out of court statements as they were hearsay (pursuant to ER 801) and not admissible pursuant to ER 106. CP 103-04. Specifically the trial court ruled that,

> It is settled law that Washington's ER 106 does not apply to oral statements. Defendant therefore may not cross examine State witnesses regarding the remainder of Defendant's out of court statements pursuant to ER 106; the admissibility of out of court statements must be

evaluated under the hearsay rules.

CP 103-04.

The trial court did not, however, ever rule that the Defendant herself could not testify regarding the alleged biting. Thus Defendant's claim on appeal that the trial court excluded "any evidence" regarding the alleged biting is simply incorrect. App.'s Br. at 19. Furthermore, the Defendant's claim that "the court excluded past incidents of domestic violence, prohibiting even Mrs. Green from testifying that Mr. Green bit her all over the night before the shooting, and the bite marks seen at the hospital" is not supported by the record. App.'s Br. at 50-51.

Although the Defendant has provided several citations to the record, those portions of the record do not support the Defendant's claim. For instance, the Defendant cites to RP 472-73. *See* App.'s Br. at 19, 51. That portion of the record, however, deals solely with the issue of whether the Defendant's hearsay statements to Detective Rodrigue were admissible. RP 457-72.

Similarly, the portion of the record at RP 703-06 does not contain a ruling by the trial court limiting the Defendant's testimony. While there was an objection from the State when the Defendant interrupted her defense counsel and interjected a statement about the biting, the trial court

never ruled that the Defendant was prohibited entirely from testifying about these allegations. RP 703 Rather, the trial court merely sustained the State's objection without discussing the basis for the ruling. The record further shows that the objection was only raised after the Defendant had interrupted her attorney when he began to ask a question. The Defendant's statement, therefore, was clearly objectionable as it was non-responsive. RP 703; ER 611.

Finally, the Defendant cites to RP 728-29. See App.'s Br. at 19. Those pages of the record, however, do not relate in any way to potential testimony regarding previous domestic violence.

In short, the trial court did rule that the defense was precluded from introducing the Defendant's self-serving hearsay statements through cross examination of the police officers. See CP 103-04; RP 472. The Defendant, however, has not offered any argument or authority in the present appeal that would suggest that the trial court's hearsay rulings were incorrect. Rather, the Defendant has mischaracterized the trial court's rulings and claims that the trial court precluded the Defendant from herself testifying about the alleged biting incident. App.'s Br. at 51. The record, however, contains no such ruling from the trial court. Thus the Defendant claim is clearly without merit.

The Defendant also briefly argues that the trial court admitted

evidence of the victim's "dementia." App.'s Br. at 52. As the Defendant provides no citations to the record in this brief argument it is difficult to understand the exact argument. The record, however, shows that the defense was allowed to call a witness, Dr. Martin, who testified that the victim suffered from early stages of Alzheimer's dementia. RP 686- 90. Thus, any suggestion that the trial court excluded all evidence relating to the victim's dementia would be incorrect. The Defendant may be arguing that the victim's dementia was related to the Defendant's claim that the victim had made a statement the night before about having sex with his sister decades earlier. If this is the intended argument, the Defendant fails to explain how that alleged statement related to the dementia or is otherwise relevant, and fails to address why the out of court statement was not properly excluded as hearsay.

As mentioned previously, the State did bring a motion to prevent the introduction of certain self-serving hearsay statements made by the Defendant to several police officers. CP TBD (See, Sept 9, 2011 "Memorandum on ER 106", included in the State's Supplemental Designation of Clerk's Papers). One of the statements that the Defendant had made to Detective Rodrigue was her claim that the victim had made some statement the night before the shooting that he had sex with his sister long ago. RP 457. As mentioned above, the trial court did rule that the

Defendant was precluded from introducing any of her self-serving hearsay statements through cross-examination of the officers. CP 103-04. The record does not show that the trial court ever specifically ruled that the Defendant could not testify regarding this claim. Furthermore, the Defendant was allowed to introduce evidence regarding the Defendant's dementia. For all of these reasons the Defendant's claim regarding the exclusion of "dementia" evidence is without merit.

Furthermore, even if this Court were to assume for the sake of argument that the trial court erred in excluding evidence as claimed by the Defendant, any error in this regard was clearly harmless. The improper admission or exclusion of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole and did not affect the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Here the Defendant claims that the exclusion of evidence hindered the defense from showing that the Defendant may have been in a suicidal state of mind. App.'s Br. at 52. Whatever potential relevance the Defendant's comment about sleeping with his sister 50 years earlier might have had on this issue clearly paled in comparison to the uncontested evidence that the victim had retrieved the firearm, held it to his own head, and asked the Defendant

to shoot him. In short, this evidence was obviously of trivial significance the State agreed that the Defendant had held the firearm to his own head and the State did not contest that the victim had asked the Defendant to shoot him. Thus even if the trial court erred, any error was clearly harmless.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE A JURY INSTRUCTION REGARDING THE DEFENDANT'S SUMMARY OF THE CASE BECAUSE: (1) THE DEFENDANT'S INSTRUCTION WAS CONFUSING; AND (2) THE TRIAL COURT'S INSTRUCTIONS ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE AND PROPERLY INFORMED THE JURY OF THE APPLICABLE LAW.

The Defendant next claims that the trial court erred when it refused to give the defense's proposed jury instruction. App.'s Br. at 52. This claim is without merit because the Defendant has failed to show an abuse of discretion. Rather, the trial court's instructions allowed the parties to argue their theories of the case, and, when read as a whole, properly informed the jury of the applicable law. Nothing more is required.

In general, an appellate court reviews a trial court's choice of jury instructions for an abuse of discretion. *State v. Hathaway*, 161 Wn.App. 634, 647, 251 P.3d 253 (2011); *State v. Douglas*, 128 Wn.App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if substantial

evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); *Hathaway*, 161 Wn.App. at 647. Furthermore, it is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory. *Hathaway*, 161 Wn.App. at 647; *State v. Portrey*, 102 Wn.App. 898, 902, 10 P.3d 481 (2000); *State v. Castle*, 86 Wn.App. 48, 62, 935 P.2d 656, *review denied*, 133 Wn.2d 1014, 946 P.2d 402 (1997).

In the present case the trial court instructed the jury that in order to convict the Defendant of manslaughter in the first degree the jury each of the following elements had to be proved beyond a reasonable doubt:

> 1. That on or about the 18th day of June 2010, the defendant fired a firearm at another person;
> 2. That the defendant's conduct was reckless;
> 3. That William Green died as a result of the defendant's acts; and
> 4. That the acts occurred in the State of Washington.

CP 38. The instruction went on to state that if the jury, after weighing all of the evidence, had a reasonable doubt as to any one of the elements, then it was the jury's duty to return a verdict of not guilty. CP 38.The Defendant has not claimed that the trial court's instructions misstated the

law, nor has the Defendant argued that she was unable to argue her theory of the case under the court's instructions. To the contrary, the Defendant clearly was able to argue that the jury was required to acquit if the State failed to prove that the Defendant actually killed the victim.

The Defendant, however, claims that the trial court abused its discretion in refusing to give the following instruction proposed by the Defendant:

> Darlene Green's theory of the case is that her husband William on June 18, 2010 committed suicide in front of her by taking his Ruger Single Shot Six pistol, placing it to his forehead and pulling the trigger thereby ending his life,
>
> The State has presented you with three alternative theories of their case,
>
> 1. Darlene intentionally but without premeditation shot her husband which caused his death.
>
> 2. That Darlene assaulted her husband and by either committing that assault, or fleeing from that assault, caused the death of William.
>
> 3. Or that Darlene recklessly caused the death of William.
>
> If you have reasonable doubt as to whether or not William Green committed suicide, then you must acquit Darlene.

CP 379.

The Defendant's claim, however, is without merit for several reasons. First, the trial court's more general "to convict" instruction adequately explained the law and allowed each party to argue its case

theory. The trial court noted this fact when it ruled on the proposed instruction and explained that the Defendant was able to argue her theory under the general instructions and thus the court was satisfied that "no specific instruction [was] appropriate." RP 749. Given the law outlined above and the trial court's general instruction which adequately outlined the relevant law, the Defendant cannot show that the trial court erred in refusing to give the Defendant's more specific instruction. *Hathaway*, 161 Wn.App. at 647; *Portrey*, 102 Wn.App. at 902; *Castle*, 86 Wn.App. at 62. Thus, the Defendant has failed to show an abuse of discretion.

In addition, although a Defendant is entitled to have the jury instructed on her "theory of the case" the Defendant has cited no authority that would support an instruction such as the one proposed in the present case. Rather, as the trial court explained, the cases regarding instructions on a defense "theory of the case" usually involve statutory defenses. RP 748. For instance, the case cited by the defense in support if the proposed instruction, *State v. Werner*, 170 Wn.2d 333, 241 P.3d 410 (2010), dealt with self-defense instruction. Thus while the *Werner* case does state that "A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction," the court was discussing a defendant's proposed self-defense instructions based on a statutory defense. *Werner*, 170 Wn.2d at 336. Refusing to instruct on self-defense

is vastly different than the instruction proposed in the present case. The Defendant's proposed instruction contained something more akin to a "summary" of the defense argument. This is clearly distinguishable from the self-defense instructions at issue in *Werner*, and the Defendant has failed to cite any authority supporting an instruction such as the proposed instruction in the present case.

Furthermore, the last sentence of the Defendant's proposed instruction is completely misleading. Under Washington law the State had the burden of proving the elements of the crime and the trial court properly instructed the jury on these elements. The Defendant's proposed instruction, however, required the jury to acquit if they had "a reasonable doubt as to whether or not William Green committed suicide." The meaning of this sentence is completely unclear. For instance, if the jury concluded beyond a reasonable doubt that the Defendant shot the victim and that victim thus *did not* commit suicide, would this mean that the jury had "a reasonable doubt as to whether or not William Green committed suicide" and thus was required to acquit? A fair reading of the instruction would be that, yes, by finding that the Defendant did not commit suicide they indeed did have a reasonable doubt as to whether or not William Green committed suicide. The instruction then would require an acquittal in such a case. That, of course, would be absurd and would amount to an

instruction that requires an acquittal if the State has in fact proven its case beyond a reasonable doubt.

An accurate statement of the law is that if the jury had a reasonable doubt as to whether or not the Defendant killed the victim, then an acquittal was required. The court's actual instructions to the jury properly advised them of this fact, adequately explained the law, and allowed each party to argue its case theory. Nothing more is required. The Defendant, therefore, has failed to show an abuse of discretion.

In addition, the Defendant's proposed instruction was confusing as it used the term "suicide" without providing any definition for that term. This could have created confusion among the jury, as a common usage of the term "suicide" can include situations where there is a second party involved with the death, such as in cases of "suicide by cop" or "assisted suicide." If the jury, for instance, believed that the Defendant shot the victim after he had asked her to do so, the jury might have believed these facts constituted a form of "suicide" (as the term is commonly used) even if the Defendant had pulled the trigger. Under the Defendant's proposed instruction this conclusion would require an acquittal. Stated another way, the Defendant's proposed instruction could be read to mean that if a victim consents to being killed, and thereby engages in a form of "suicide," that this constitutes a defense. This conclusion, however, is contrary to

Washington law as the Legislature has never established a "consent" defense for murder or manslaughter, nor has the Defendant ever provided any authority to support such a defense.

For all of these reasons, the Defendant has failed to show that the trial court abused its discretion by refusing to give the Defendant's proposed instruction.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED May 24, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

May 24, 2013 - 12:22 PM

Transmittal Letter

Document Uploaded: 436329-Respondent's Brief.pdf

Case Name: State v. Darlene Green

Court of Appeals Case Number: 43632-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jeremy A Morris - Email: **jmorris@co.kitsap.wa.us**

A copy of this document has been emailed to the following addresses:
lenell@nussbaumdefense.com